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STATE DISBARMENT PROCEEDINGS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

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I. INTRODUCTION

ALTHOUGH the professional competency of lawyers is at its highest level, a growing dissatisfaction with the adequacy of the discipline maintained by bar associations is readily apparent in a survey conducted by one state agency, which concluded that

> a majority of lawyers are convinced that the public image of the profession is affected adversely by the policing procedure of the Canons of Ethics and that policing is not adequately enforced.[1]

The public is losing faith in the profession and attorneys do not enjoy the public trust they should be accorded in their critical position as guardians of the people's rights.[2]

In a recent case, *Spevack v. Klein*,[3] a lawyer was subpoenaed to appear before a New York judicial inquiry into his professional conduct, and to bring with him certain records. The lawyer appeared before the investigating body, but refused to testify or produce any documents, citing his privilege against self-incrimination. He was disbarred for his failure to answer questions, under the doctrine enunciated by the Supreme Court of the United States in *Cohen v. Hurley*.[4] The attorney argued that his disbarment denied him due process of law in violation of the fourteenth amendment, because without any substantive evidence of wrongdoing, it was a severe penalty for his mere failure to answer questions put to him by the investigating body. The Supreme Court of the United States explicitly overruled *Cohen* and reversed the state court's disbar-

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1. *See* Lawyers Practice Manual, Missouri Bar-Prentice Hall Survey 16 (1964).

2. Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960). *See* Justice Terrell's concurring opinion wherein he remarked: "This and other courts have many times called attention to the fact that one practices law by grace and not by right, that the practice of law is affected wih a public interest and that the privilege to practice may be withdrawn from one when wilful disregard of the honor of the profession is shown. It is common knowledge that many lawyers personally enjoy public esteem and confidence, *but as a profession the public is skeptical of us and we do not enjoy the measure of public confidence we should.*" 118 So. 2d at 20 (emphasis added). In a most historical perspective Montaigne once declared that an attorney should state his final proposition first. Judge Warren E. Burger of the United States Court of Appeals for the District of Columbia in describing the state of the legal profession, commented on Montaigne's statement and posited the following proposition: "(1) the legal profession as a whole has very poor standing; (2) there are many causes for this; some of them incompetence, misconduct, bad manners and lack of training of a great many lawyers who appear in the courts; and (3) there is something we can and ought to do about this as the English bar and bench did a century ago.' *See* Burger, *A Sick Profession*, 5 Tulsa L.J. 1 (1968).

3. 16 N.Y.2d 1048, 213 N.E.2d 457, 266 N.Y.S.2d (1965); 17 N.Y.2d 490, 214 N.E.2d 373, 267 N.Y.S.2d 210 (1966).

4. 366 U.S. 117 (1961). See text following *infra* note 65.

ment order.[5] The Court held that the fifth amendment privilege against self-incrimination was absorbed into the fourteenth amendment and extended to state disbarment and disciplinary actions against attorneys. To arrive at this result the four justices who dissented in *Cohen*[6] needed the addition of Mr. Justice Fortas to the bench to establish a majority. Added to this was the majority's equating of a "criminal case" with a case involving a "penalty" not restricted to a fine or imprisonment, but involving the imposition of any sanction that made the assertion of the privilege against self-incrimination "costly."[7] The plurality opinion held essentially that since the fifth amendment was binding on the states[8] the penalty of disbarment for invoking the privilege constituted a violation of due process. Justice Douglas declared that:

> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. . . . We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. . . . [L]awyers also enjoy first-class citizenship.[9]

Justice Fortas filed a concurring opinion in which he distinguished *Spevack* from *Garrity v. New Jersey*,[10] decided by the Court on the same day. In *Garrity*, two policemen testified in an official inquiry because they would have been discharged had they asserted the privilege against self-incrimination and refused to testify. The Court in *Garrity* held that the statements obtained from public employees following a threat of discharge for refusal to answer could not be admitted as evidence in a subsequent criminal prosecution of such employees, on the ground that such procedure violated the fifth amendment.[11] Justice Fortas indicated that he could have voted to affirm the attorney's disbarment if the case had presented the question of whether a lawyer could be disbarred for refusing to keep or produce, upon properly authorized demand, records which the lawyer was required by the state to keep as part of his duties.[12] He distinguished the two cases on the grounds that as between attorneys and public employees, the latter has a greater responsibility to the state. The public employee, as distinguished from an attorney, is an agent of the state.

5. 385 U.S. 511 (1967).
6. These were Justices Black, Douglas, Brennan and Chief Justice Warren.
7. *See* 385 U.S. 511 at 515 citing *Griffin v. California*, 380 U.S. 609 (1965) where the Court had said that the fifth amendment operating through the fourteenth amendment "forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt." 380 U.S. at 615.
8. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
9. 385 U.S. 511 at 516.
10. 385 U.S. 493 (1967).
11. The opinion by Justice Douglas cited *Union Pac. R.R. Co. v. Pub. Service Comm'n*, 248 U.S. 67 (1918) where a certificate exacted under protest and in violation of the commerce clause was held invalid. Justice Douglas said in *Garrity:* "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." 385 U.S. at 498.
12. 385 U.S. 511 at 520 (concurring opinion, Fortas, J.).

As such, he has a duty to account to the state for his actions. The attorney, on the other hand, has merely the duty to obey the rules of conduct laid down as part of the state's licensing procedures. The special responsibilities of the attorney do not, however, deny to the attorney the availability of fifth amendment privileges.[13]

The significance of this opinion is in its narrow view of the professional responsibility of the bar and its members. It seems to reject any notion of an attorney's higher duty in the protection of individual rights, and it places perhaps too great a confidence in the state bar agency's interest in the integrity of its members.[14]

Four justices dissented in *Spevack*[15] and the thrust of their argument is excellently described in the dissenting opinion of Justice Harlan who said:

> What is done today will be disheartening and frustrating to courts and bar associations throughout the country in their efforts to maintain high standards at the bar. . . . [S]till more pervasively, this decision can hardly fail to encourage oncoming generations of lawyers to think of their calling as imposing on them no higher standards of behavior than might be acceptable in the general market place. The soundness of a constitutional doctrine carrying such denigrating import for our profession is surely suspect on its face.[16]

Justice White contended that the *Garrity* rule precluding the use of coerced testimony in subsequent criminal proceedings would similarly protect testimony elicited during disbarment proceedings. With the protection thus extended to statements made by an attorney in a disbarment proceeding, Justice White argued that the fifth amendment privilege should not be available to an attorney who would thwart the attempted purposes of the proceeding by refusing to communicate information relating to the performance of his public duty.[17]

Although *Spevack*, if narrowed to its precise holding, does not portend trouble, the expansion of its "fringes"[18] which has already begun[19] may create numerous problems for bar associations. The reaction to *Spevack* was mixed,[20] but one of the most distressing statements was made by Maurice Cathey, President of the Arkansas Bar Association:

> There are those within our profession who would applaud the present course of judicial decision, which gives primary emphasis, maximum

13. *Id.* at 519-20.
14. *See* Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970, 971 (1968).
15. Justices Harlan, Clark, Stewart and White.
16. 385 U.S. 511, at 520-21 (dissenting opinion, Harlan, J.).
17. 385 U.S. 511, at 531 (dissenting opinion, White, J.).
18. *See* Franck, *supra* note 14 at 974.
19. The problem as to whether disbarment proceedings come within the meaning of the "criminal case" provision of the fifth amendment was recently decided in *In Re Ruffalo*, 390 U.S. 544 (1968) where Justice Douglas obtained a nearly unanimous decision holding that disciplinary proceedings are of a "quasi-criminal nature."
20. *Cf.* Givens, *Reconciling the Fifth Amendment with the Need for more Effective Law Enforcement*, 52 A.B.A.J. 443 (1966); Niles & Kaye, *Spevack v. Klein: Milestone or Millstone in Bar Discipline?* 53 A.B.A.J. 1121 (1967).

> benefit and almost complete protection to the privileges which the lawyer can enjoy in acquiring and retaining the rewards which go with his license to practice law. . . .
>
> I hope that the organized bar will never say that, when a lawyer's professional conduct and competency be challenged, the legal profession need seek only constitutional parity with Escabedo, Miranda and the other famed names of our decade. . . .
>
> [A]s lawyers we must place both our standards and our obligations above those of the tradesman in the market-place and the accused in a criminal prosecution.
>
> Law and the practice of law have been good to all of us. Our prospects are bright if we do not let our demands for rights and privileges eclipse our concepts as to our responsibilities.
>
> In exchange for the privileges which have been granted to us as members of the legal profession, we owe to the administration of justice a great something in return.
>
> With centuries of tradition and history behind us, the final worth of the legal profession is yet to be measured. This true measure will be found not in how eloquently we speak, how high we climb, or how fast we run. The true measure will be found in how tall we stand when we bear our burdens.[21]

Focusing upon the problems in the area of disbarment, this article will attempt to delineate the privilege against self-incrimination as applied to various proceedings. The conceptual framework of the privilege will be analyzed most specifically in state disbarment proceedings after a presentation of the historical antecedents of the fifth amendment privilege. An attempt will be made to effectively reconstruct the rationale which led to *Spevack* and present the problems which may develop out of this decision and the importance of reflection by the bar and the courts of its impact in state disbarment procedures.

II. Historical Development of the Privilege against Self-Incrimination

The historical roots of the privilege against self-incrimination as embodied in the fifth amendment to the constitution are to be found in the resistance of Englishmen to the so-called oath ex officio of the eccelesiastical courts. The purpose of these investigations was to unveil suspected violators of church canon or custom, or to exposit the truth of either vague or definite charges not disclosed to the person questioned.[22]

The *maxim* "Nemo tenetur prodere (or accusare) seipsum"—"nobody is bound to accuse himself,"[23] first came into general notice as a result of the

21. *See* Cathey, *The Fifth Amendment—Its Protection of the Right to Become and Remain a Lawyer*, 21 Ark. L. Rev. 361, 366-7 (1967).

22. *See* Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

23. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71, 87 (1891). For an historical analysis of the American conceptualization of this maxim, *see* Brown v. Walker, 161 U.S. 591 (1896). The Court there said: "The Maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of inter-

protest against characteristic procedures of the English Law, such as the practice of the Star Chamber around 1487;[24] and the initial occasion for its appearance was the controversy which developed near the end of the 16th century between common law courts and the Court of High Commission.[25] In 1589 the issue was raised in the Common Pleas in *Collier v. Collier*[26] where Lord Coke as counsel for the petitioners sought, and according to two of the accounts[27] obtained a Writ prohibiting the spiritual courts from examining them on charges of incontenency. Although a later decision held to the contrary,[28] in 1607 when Coke had been elevated to the position of Chief Justice of the Common Pleas, he enunciated the doctrine that the oath could not be exacted regarding any matter punishable at common law.

In an answer propounded by Coke and Popham, Chief Justice of the King's Bench, they declared that:

> it standeth not with the right order of justice nor good equity that any person should be convicted and put to the loss of his life, good name, or goods, unless it were by due accusation, and witnesses, or by presentment, verdict, confession, or process, or outlawry.[29]

In light of Coke's advocacy and later judicial recognition of the rationale that no man should accuse himself, the ultimate fruition of the maxim occurred

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rogating accused persons, which [have] long obtained in the continental system, and, . . . [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, . . . made the system so odious as to give rise to a demand for its total abolition. . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." 161 U.S. at 596-97.

24. *See* Morgan, *supra* note 22, at 4, n.12 where Baldwin in an historical account indicates that the accused in criminal cases before the King's Council had to appear in person, without counsel, and to "answer the charges which were most likely not known to him in advance . . . If he did not immediately confess or satisfactorily explain the charges, he was put to the method known as the interrogatory examination. This was an acknowledged feature of the civil and criminal law which in its extreme form was pursued by the church especially but not exclusively in heresy trials. It was a method that was creeping into secular practice, in the courts of the kings bench and common pleas, as early as the reign of Edward I . . . As practically administered the examinations were of several degrees, according to the nature of the case and the advancement of the art of questioning."

25. *See* H. G. Hanbury, English Courts of Law, (4th ed. 1967); M. Hastings, The Court of Common Pleas in Fifteenth Century England (1947).

26. 4 Leon 194; Cro. El. 201; Moor 906.

27. *See* Wigmore, *The Privilege Against Self-Incrimination; Its History*, 15 Harv. L. Rev. 610, 620 n.4 (1902).

28. Doctor Hunt's Case, Cro. El. 262 (1591).

29. 12 Rep. 26-29. To the same effect, *see* Corwin, *Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 7-8 (1930).

in the trial of John Lilburne before the court of the Star Chamber in 1637.[30] Lilburne refused to answer questions concerning matters as to which there had been no accusation against him.[31] The penalty imposed was a whipping, which took place in 1638. Three years later Parliament declared the action illegal and most unjust, against the liberty of the subject and the law of the land, and Magna Carta.[32] Some months later he was ordered a 3,000 pound reparation for the punishment he had suffered.[33] Shortly thereafter in 1641, the Court of the High Commission and Court of the Star Chamber were abolished by statute.[34]

The total impact of this decision is expressed by Professor Corwin in these terms:

> Liburne's trial, together with this aftermath, has, therefore, a two-fold bearing upon the development of the modern doctrine against self-incrimination: first, in the wide advertisement which it afforded the maxim as a constituent element of "law of land," deemed to have been consecrated by Magna Charta; and secondly, in substantially obliterating the distinction which had existed, certainly in Coke's mind, between the status in relation to the maxim of a regularly *accused defendant* and that of other persons.
>
> From this time forth judicial recognition and development of the maxim proceeded with great rapidity, so much so indeed that long before the Constitution of the United States was adopted, or even before American independence was thought of, the privilege against self-incrimination had received an extension in the English cases which in some respects is broader than its application by the United States Supreme Court today.[35]

Although some legal historians have argued that that privilege remained an unknown doctrine for a whole generation and was "unrecognized" until at least as late as 1685,[36] the great weight of authority has presented evidence that the privilege had become conceptualized in the New England colonies in the language of the Body of Liberties enacted in 1641.[37]

The early American colonists objected to the inquisitorial methods used

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30. 3 How. St. Tr. 1315 (1640).

31. Lilburne argued that if " 'he had been proceeded against by a bill' . . . he would have responded, that is to say, as a *witness* concerning the conduct of others he was protected from incriminating himself, although had he been regularly *accused* he would have had to testify." (Found in Corwin, *supra* note 29 at p. 8).

32. 3 How. St. Tr. 1342 (1640).

33. 8 Wigmore, Evidence § 2250 (McNaughton rev. 1961).

34. Statutes of the Realm, 110-13.

35. Corwin, *supra* note 29 at p. 9.

36. 8 Wigmore, Evidence § 2250 (McNaughton rev. 1961).

37. *See* Bradford, *History of the Plymouth Plantation*, Mass. Hist. Soc. Coll. Ser. 4 Vol. 3 pp. 390-91. *See* also, Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 775 n.34 (1935).

by royal governors and their counsel, and protection was afforded within Liberty No. 45 which read in part:

> No man shall be forced by torture to confess any crime against himself nor any other unlesse it be in some capital case where he is first fullie convicted by clear and sufficient evidence to be guilty . . .[38]

It was the condemnation of torture and the negation of infamy as a sanction that brought the fifth amendment into the Constitution.[39] There is little question that it was the founding fathers' desire to remedy the evil of exacting confessions by the use of torture[40] which resulted in the formation of the third clause of the fifth amendment which reads "no person . . . . shall be compelled in any criminal case to be a witness against himself."[41]

Justice Douglas has said that the fifth amendment

> was written in part to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will. The Fifth Amendments protects the conscience and the dignity of the individual, as well as his safety and security, against the compulsion of government.[42]

Dean Griswold has recently remarked that:

> Where matters of a man's belief or opinions or political views are essential elements in the charge, it is most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone.[43]

Thus succeeding generations of judicial minds have recognized the privilege to be an important as well as difficult one to apply in various factual circumstances. Still, it is regarded as one of the most important concepts and safeguards within American criminal jurisprudence,[44] as evidence in part by the fact that the constitutions of all but two of the states contain provisions similar to those embodied within the United States Constitution.[45]

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38. Whittmore, Col. Laws of Mass. pp. 32-61. Mass. Hist. Soc. Coll. Ser. 3 Vol. 8 p. 2247.
39. *See* Ulman v. United States, 350 U.S. 422, 447-48 (1956).
40. *See e.g.*, Virginia Debates, 2d ed. 1805, 221, 320-21; 2 Elliot's Debates 111 (2d ed. 1876). Cited in Ullman v. United States, *supra* note 39 at 448.
41. United States Constitution, Amendment V.
42. *See* Ullman v. United States, 350 U.S. 422, 449 (1956) (dissenting opinion, Douglas, J.).
43. *See* Griswold, The Fifth Amendment Today, 8-9 (1955).
44. *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966).
45. In these two states, Iowa and New Jersey, it has been adopted by case law. *See* 8 Wigmore, Evidence 319-29 (McNaughton rev. 1961).

III. Jurisdiction of State Courts in Disbarment Proceedings

A. *Early Supreme Court Decisions*

During medieval England, the Inns of Court, judges and Parliament supervised the admission and discipline of attorneys.[46] In England no one could become a barrister without the consent and approval of the Inns of Court and no reason had to be given for the Inns' failure to approve or discipline a member of the legal profession. The only remedy was by appeal to the twelve judges in their capacity as visitors of the Inns of Court. Towards the end of the middle ages a well organized profession had developed in England.[47]

During the period of colonization this characterization of the profession as "organized" was not favored by the legal profession itself, but through experience it was recognized that the necessity of a professional organization would be the only means of survival from corruption and immorality within the profession.[48] Supervision of the profession and the practice of law was accomplished through the dual acquiescence of both the legislature and the courts. At an early date it was acknowledged that the judicial branch should exercise control of the state bar and comparable agencies having jurisdiction over admissions standards and disciplinary proceedings. It was also decided that such activities were fundamentally a state function and therefore best left to the discretion of the states, rather than to federal agencies.

The Supreme Court of the United States was faced with this problem in *Ex Parte Burr*,[49] a case which involved the removal and suspension of an attorney from the Circuit Court for the District of Columbia. Chief Justice Marshall indicated that the Supreme Court would not interfere with a state court's decision concerning disbarment unless it was grossly irregular and unjust. In denying the petitioner's motion to be restored to his position as an attorney, Justice Marshall indicated that the judiciary ought to be given some discretion in controlling the procedures of the bar, in order to protect not only the attorney's exercise of his professional duties and responsibilities, but the respectability of the bar itself.[50]

Addressing itself to the same problem at a later date, the Supreme Court in *Ex Parte Secombe*[51] decided that the determination of qualifications for becoming an attorney and counsellor and causes for removal rested exclusively with the judicial branch. The Court there said that

> the relations between the court and the attorneys and counsellors who practice in it, and their respective rights and duties, are regulated by the common law. And it has been well settled, by the rules and practice

46. Pound, The Lawyers From Antiquity to Modern Times 100 (1953).
47. *Id.* at 93.
48. *Id. at* XXVIII. *See* Note, *State Versus Federal Jurisdiction and Control Over Admission and Discipline of Attorneys*, 64 W. Va. L. Rev. 70, 71 (1961).
49. 9 Wheat. 529 (1824).
50. *Id.* at 530.
51. 19 How. 9 (1856).

> of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.[52]

Chief Justice Taney emphasized that this power had limitations and indicated the importance of the court exercising its discretion in a manner which would not impinge on the rights and the independence of the bar.[53] This position was reaffirmed in *Ex Parte Garland*[54] where the principal issue and holding dealt with an enactment by Congress prescribing, as a qualification for the admission as attorney and counsellor in the Supreme Court, a test oath by deponents that they had never voluntarily borne arms against the United States. The Court held the statue void, declaring that:

> The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. . . . Their admission or exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases.[55]

In *Randall v. Brigham*,[56] involving malpractice proceedings against an attorney, the authority of the courts in this area was reiterated. In analyzing the court's role in this respect, Justice Field reasoned that the special responsibilities of attorneys as officers of the court and counsellors of private clients demand that they be endowed with ability of a high order and the strictest integrity. It is the role of a judiciary to assure that these qualities adhere in members of the legal profession.[57]

The most significant aspect of this decision was the statement of guidelines and standards with respect to the procedures in disciplinary proceedings. The Court's opinion declared:

> It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from his own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be

52. *Id.* at 13.
53. *Id.*
54. 4 Wall. 333 (1865).
55. *Id.* at 378-79.
56. 7 Wall. 523 (1868).
57. *Id.* at 540.

> conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.[58]

This early development of informal disciplinary proceedings for attorneys, regulated solely by the court in the exercise of its judicial discretion, resulted primarily from the lack of general limitations circumscribing the powers of the state against aggrieved individuals.[59] Because the Bill of Rights, prior to 1868, was applicable only to the national government, attorneys were not afforded constitutional protection of their rights in such discretionary proceedings. When the fourteenth amendment became welded into the case law, a significant trend developed toward protecting individual liberties from encroachment by the states.[60]

B. *Change in the Philosophy of the Court Regarding Privilege and its Application to Disbarment Cases*

The Supreme Court in 1957 decided in *Schware v. Board of Bar Examiners*[61] and *Konigsberg v. State Bar*[62] that state bar admission standards or procedures, if they negated constitutional rights, would be violative of due process.

In *Schware*, the petitioner's exclusion from the bar had been based upon his admitted membership in the Communist Party from 1932 to 1940. His application also revealed that he had used certain aliases while working at the docks between 1933 and 1937. He had been arrested on "suspicion of criminal syndicalism" in violation of a state statute even though he was never formally charged. He was also arrested and indicted for violating the Neutrality Act of 1917. The charges were all dismissed and he was released on all occasions. The New Mexico Board of Examiners reviewed the evidence and after a formal hearing denied the petitioner an application for admission to the bar examination on the grounds that he did not have the requisite "good moral character" as required by statute. The New Mexico Supreme Court affirmed the Board's decision. The Supreme Court of the United States, speaking through Justice Black, reversed the state court ruling and concluded that Schware's past membership was not sufficient to warrant an inference of bad character and that there was no rational evidence which made him morally unqualified to take the bar examination. Consequently, the Court held that Schware had been denied due process.[63] Justice Frankfurter, with Justices Clark and Harlan, concurred on the ground that the state court was unwarranted in concluding that peti-

58. *Id.*
59. Barron v. Baltimore, 7 Pet. 243 (1833).
60. *See* Dowling, Constitutional Law 599 (6th ed. 1959).
61. 353 U.S. 232 (1957).
62. *Id.* at 252.
63. *Id.* at 246-47.

tioner's past communist affiliation made him "a person of questionable character."[64]

In the *Konigsberg* case the Court was faced with a much more complex situation. The California State Committee of Bar Examiners refused to certify the applicant for admission on the grounds that he had refused to answer questions as to his present and past membership in the Communist party. Konigsberg contended that this action violated his first amendment freedoms and that a state could not inquire into his political opinions and associations. The Committee based its refusal of certification on the fact that the petitioner had failed to prove that he was of good moral character[65] and that he did not advocate the violent overthrow of the government. The Supreme Court held that the committee's denial violated due process; basing its decision on the fact that the evidence available upon which to judge Konigsberg's qualifications was arbitrary and unreasonable.[66] The Court's propensity to freely overrule the state court determinations upon a showing of unreasonableness caused Justice Harlan to warn that the Court might have gone beyond the limits of judicial authority, acting "instead as if it were a super sate court of appeals."[67]

The rationale exposited by the majority of the Court continued for only four years. In 1961, the Court virtually reversed itself. In three 5-4 decisions the Court held that the states could constitutionally condition the opportunity to practice law on the cooperation displayed by an applicant in answering questions and revealing pertinent information when examined by bar admission committees as well as judicial inquiries into a practicing attorney's professional ethics.

The first case, *Konigsberg v. State Bar*[68] was before the Court a second time. *Konigsberg I* had been remanded by the Court and the applicant had again refused to answer the committee's questions. The California State Bar again denied Konigsberg an application on the grounds that his refusal obstructed a full investigation of his qualifications. The California Supreme Court affirmed the ruling.[69] In *Konigsberg II*, the Supreme Court of the United States affirmed the State Bar's action,[70] relying on *Beilan v. Board of Education*[71] which had held that a state could, without violating due process, dismiss a teacher who refused to answer his employer's questions regarding subversive activities. The one limitation the Court did impose was that the questions

64. *Id.* at 250-51 (concurring opinion, Frankfurter, J., and Clark, and Harlan, J.J.).
65. For an excellent discussion of the difficulty in determining and proving "good moral character" on the part of both the applicant and the Committee, see Starrs, *Consideration on Determination of Good Moral Character*, 18 U. Det. L.J. 195 (1956).
66. 353 U.S. at 262.
67. *Id.* at 277 (dissenting opinion, Harlan, J.).
68. 366 U.S. 36 (1961).
69. 52 Cal. 2d 769, 344 P.2d 777 (1961).
70. For a clear indication of the reasons for the Committee's decision see 366 U.S. at 39 nn.2-3.
71. 357 U.S. 399 (1958).

asked by the appropriate agency had to be reasonably connected with the practice of law.[72]

In re Anastaplo[73] was similar to *Konigsberg*, except that there was no evidence linking the applicant to the Communist Party. In affirming the Illinois Supreme Court's decision in denying Anastaplo admission to the bar, the Court relied on the rationale of *Konigsberg II* and held that a prospective attorney violates his duty to the bar examiners when he bases his refusal to answer upon an unavailable constitutional privilege.[74] The weakness of *Anastaplo* is that the Court did not articulate any guidelines which would identify situations, if any, that would prove the noncooperation ground a sham.[75]

The third case, *Cohen v. Hurley*,[76] involved a judicial investigation relating to alleged professional misconduct on the part of the petitioner. Relying on his privilege against self-incrimination, he refused to answer material questions. A disbarment was filed against the petitioner on the ground that he deliberately refused to cooperate with the court in its efforts to expose certain unethical practices. In rejecting the petitioner's claim that the disbarment was violative of due process, the Supreme Court affirmed the state court's action. Justice Harlan, in his opinion for the majority, reasoned that the state has through history rightfully assumed a substantial interest in conducting investigations and in disciplining members of the bar, in order to maintain the highest standards of professional conduct in its attorneys.[77] Accordingly, the manner of performing this disciplinary function should be entirely within the discretion of the particular state and its courts.

The Court reasoned that since an order of disbarment is distinctly different from a penal sanction for misconduct, the state is to be given a wide latitude with respect to constitutional requirements in conducting disciplinary investigations.[78] The primary support for this rationale was derived from the theory that a state's interest in maintaining the integrity and reputation of the bar required procedures resulting in the certainty of prevention of misconduct among its members.[79]

As to the contention that the majority opinion separated attorneys into a "special group" with "special burdens," Justice Harlan retorted that:

> This argument wholly misconceives the issue and what the Court has held respecting it. The issue is not, of course, whether lawyers are entitled to due process of law in matters of this kind, but, rather, what process is constitutionally due them in such circumstances. We do not hold that lawyers, because of their special status in society, can *there-*

72. 366 U.S. at 52-53.
73. 366 U.S. 82 (1961).
74. *Id.* at 89.
75. *Id.* at 97.
76. 366 U.S. 117 (1961).
77. *Id.* at 123-24.
78. *Id.* at 126.
79. *Id.* at 127.

> *fore* be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these inquiries.[80]

Mr. Justice Black's dissent criticized the indiscriminate use of history in determining whether due process was accorded the petitioner. His criticism was based primarily on the ostensible desire of the founding fathers to prevent well-known historical injustices, including those caused by disciplinary methods against attorneys.[81] Justice Black, in addressing himself to the factual evidence presented by the record,[82] argued that due process and equal protection were being violated. He believed that the petitioner's disbarment would result in financial loss, destruction of reputation, and would bring familial suffering not consonant with his past record as an attorney. Justice Black reasoned that the nature of disbarment is indeed a strong penalty, and that membership in the bar is not merely a privilege, conferred by the state, to be withdrawn for "the 'breach' of whatever vague and indefinite 'duties' the courts and other lawyers may see fit to impose on a case-by-case basis."[83]

In a separate dissent Mr. Justice Douglas maintained that the fourteenth amendment's due process clause obligated the states to accord the full sweep of the fifth amendment's privilege against self-incrimination to one who invokes it. Moreover, he declared that even "apart from the Fifth Amendment . . . a State may [not] require self-immolation as a condition of retaining the license of an attorney."[84]

Justice Brennan's dissent gave support to this argument by reason of the long line of cases which had incorporated into the fourteenth amendment various safeguards contained in the Bill of Rights. Thus, Brennan concluded that:

> the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, lawyer or not, against the State, has the same scope as that against the National Government. . . .[85]

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80. *Id.* at 129-30.

81. Justice Black cited the famous trial of John Peter Zenger who had been a newspaper publisher who had criticized the government and was charged with seditious libel. 366 U.S. at 140 n.18.

82. Black criticized the majority for not confining conflicts over professional ethics to those "ordinary and investigatory and prosecutorial processes," adding that the record indicated that "[a] man who has devoted thirty-nine years of his life to the practice of law and who, so far as this record shows, has never failed to perform those services faithfully and honorably is being dismissed from the profession in disgrace and is having his means of livelihood taken away from him at a point in his life when it seems highly unlikely that he will be able to find an adequate alternative means to support himself." 366 U.S. at 148.

83. *Id.* at 147.

84. 366 U.S. 117, 153 (dissenting opinion, Douglas, J.).

85. 366 U.S. 117, 160 (dissenting opinion, Brennan, J.).

This forceful minority became the majority in 1967, in *Spevack v. Klein*,[86] where the rationale that an attorney's disbarment may be predicated on his assertion of the privilege was expressly rejected. A number of reasons for this reversal can be stated. Initially, the addition of Mr. Justice Fortas to the Supreme Court commanded a majority. Secondly, three years after *Cohen*, in *Malloy v. Hogan*[87] the Court held: (a) that the self-incrimination clause of the fifth amendment was applicable to state criminal proceedings via the due process clause of the fourteenth amendment; (b) that the person claiming the privilege could not be made to suffer a "penalty" for remaining silent in reliance on the privilege; and (c) that the same guidelines must be used at both the state and federal levels of government whenever an individual relies upon the fifth amendment.

The federal standard ennunciated and made applicable to the states as a result of *Malloy* was that the judge must believe that, from all the circumstances and the nature of the evidence sought, the answer could *possibly* have a tendency to incriminate the witness.[88] The state standard which was rejected had been that if the judge determined that there was some *reasonable* ground to apprehend danger to the witness were he compelled to answer, then the question was incriminating.[89]

The *Malloy* decision expanded the types of questions which were considered incriminating whereas in many state courts the limitation had been only as to those questions concerned with the essential facts of a crime or those facts which might assist in establishing a case against the witness.[90] Whether *Malloy* was an imposition of a federal standard that would negate state experimentation in the area of criminal procedure has only recently manifested itself.[91] The *Malloy* decision, although not expressly overruling *Cohen* did recognize that the principle upon which the latter decision was based had been seriously eroded.[92]

When the Court was faced with *Spevack*, which was substantially on all

86. 385 U.S. 511 (1967).

87. 378 U.S. 1 (1964). Petitioner, as a witness in a state inquiry into gambling and other crimes, invoked his privilege against self-incrimination, refusing to answer a number of questions related to events surrounding his previous arrest during a gambling raid and his conviction of pool selling. The Connecticut Superior Court adjudged him in contempt and committed him to prison until he was willing to answer. His application for habeas corpus was denied by the Superior Court, and the Connecticut Supreme Court of Errors affirmed, holding that the fifth amendment's privilege against self-incrimination was not available to a witness in a state proceeding, that the fourteenth amendment extended no privilege to him, and that he had not properly invoked the privilege available under the Connecticut Constitution. 150 Conn. 220, 187 A.2d 744.

88. Hoffman v. United States, 341 U.S. 479 (1951).

89. The test was first enunciated in *The Queen v. Boyes*, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (Q.B. 1861) and was followed in *Mason v. United States*, 244 U.S. 362, 365 (1917).

90. *See* Note, *Constitutional Law*, 37 Colo. L. Rev. 157, 158 n.10 (1964).

91. *See* the concurring opinion of Justice Fortas in *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) and *Duncan v. Louisiana*, 391 U.S. 145 (1968) where he indicates that such an imposition is without authority and there is no necessity for such a doctrine.

92. 378 U.S. at 11.

fours with *Cohen*, they had to either affirm Spevack's disbarment or to overrule *Cohen*. The Court chose the latter course primarily because of the implications of *Malloy*. The dissent in *Spevack* did state that *Malloy* simply stood for the proposition that the fifth amendment was applicable to state hearings, but that failure to "provide information relevant to charges of misconduct . . . vitiated the protection afforded by the privilege" and permitted disbarment.[93] The difficulty in rationalizing the *Spevack* holding can be mitigated by an analysis of the methodology used by the Court in the pre-*Malloy* decisions, that of balancing the respective interests, as compared with the post-*Malloy* philosophy of "incorporating" certain rights contained in the first eight amendments "whole."[94]

Until *Spevack* the privilege against self-incrimination as applied to attorneys in disbarment proceedings was a superficial employment of the constitutional guarantee.[95] The utilization of the balancing test in the *Konigsberg*, *Schware*, *Anastaplo*, and *Cohen* cases was determined to be violative of due process after *Malloy*. In *Malloy* the fifth amendment had been "incorporated" because it was "implicit in the concept of ordered liberty."[96] But for whom, to what degree, and in what circumstances?

The answer to these questions is also the third reason for the *Spevack* holding. At the same time that *Cohen* and *Malloy* were being decided, the Court's trend in finding constitutional the dismissals of teachers and public employees who claimed their privilege against self-incrimination before departmental proceedings and legislative hearings[97] was clearly apparent.

In *Adler v. Board of Education*[98] the Supreme Court had upheld New York's "Feinberg Law"[99] which provided for the dismissal of teachers who were

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93. Spevack v. Klein, 385 U.S. 511, 520, 522 (1967) (dissenting opinion, Harlan, J.).

94. For a criticism and the logical inconsistency that developed as a result of the theory of "incorporation" and the method by which the federal standard was made applicable *see* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74, 81-82 n.28 (1963). Also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 935-36 (1965) where the author suggests that the incorporation doctrine is only viable if one accepts that judicial subjectivity is the explanation for making certain "specifics" applicable as opposed to total incorporation as argued for by Justice Black in *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion, Black, J.).

95. This concept had first been stated by Justice Brennan in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (dissenting opinion, Brennan, J.). Later in *Pointer v. Texas*, 380 U.S. 400 (1965) involving confrontation of witnesses Justice Goldberg argued that because the safeguards of the Bill of Rights was so essential to liberty the federal standard should be made applicable. 380 U.S. 410, at 413 (concurring opinion, Goldberg, J.).

96. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

97. *See, e.g.*, Slochower v. Board of Education, 350 U.S. 551 (1956); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

98. 342 U.S. 485 (1952).

99. N.Y. Educ. L. § 3022(2) states in part that "membership in any such organization included in such listing . . . shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state . . ."

members of certain subversive organizations. There the teachers were permitted to explain their reasons for failure to testify at the initial administrative hearing. Subsequently, in *Slochower v. Board of Education*[100] the Court held that a dismissal of a Brooklyn College professor who had claimed his privilege was unconstitutional. The court indicated that *Slochower* was not necessarily entitled to his job, but should have been given the opportunity to explain his reason for refusing to answer the legally authorized inquiries into his official conduct as was done in *Adler*. Justice Clark, speaking for the majority, contended that an equation of guilt with the exercise of the privilege would reduce the right "to a hollow mockery."[101]

In 1958, in *Beilan v. Board of Education*,[102] Justice Clark cast his vote with the majority, and the Court upheld the dismissal of a teacher in Pennsylvania who refused to answer questions regarding his political associations, after a warning that failure to answer might lead to dismissal. Justice Burton's opinion noted that an employee working in a sensitive position has the obligation of answering questions put to him with frankness, candor, and the cooperation when such inquiry involves his fitness to teach. Citing *Adler*, the majority opinion in *Beilan* opened:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.[103]

Since these cases, decided before *Malloy*, the Court's philosophy has undergone a complete change. This was reflected in *Keyishian v. Board of Regents*,[104] decided after *Garrity* and *Spevack*. In the *Keyishian* case, a number of faculty members of the State University of New York brought an action for declaratory judgment that a New York law[105] which required teachers to sign a loyalty oath was unconstitutional. In holding the statute violative of due process, the Supreme Court of the United States cited *Schware v. Board of Bar Examiners*[106] and stated that "mere [communist] Party membership, even with the knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment . . . nor may it warrant a finding of moral unfitness justifying disbarment."[107] Al-

See Keyishian v. Board of Regents, 385 U.S. 589 (1967), and text following *infra* note 104 where the Court declared this statute to be unconstitutionally vague.

100. 350 U.S. 551 (1956).
101. *Id.* at 557.
102. 357 U.S. 399 (1958).
103. *Id.* at 405.
104. 385 U.S. 589 (1967).
105. N.Y. Educ. L. § 3021-22.
106. 353 U.S. 232 (1957).
107. 385 U.S. at 607.

though *Keyishian* did not involve the privilege against self-incrimination, the broad language of the Court seems to absorb this constitutional safeguard as well, declaring that the constitution rejects the proposition that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[108]

An examination of these decisions indicates the alternatives that faced the *Spevack* Court.[109] It could have extended the *Beilan* duty rule, by analogy, to the attorney-Bar relationship. It could have extended *Malloy*, leaving public employees as a group to be covered in subsequent decisions. Finally, it could have restricted the *Beilan* rule, making it applicable only to public employees, and narrowing the *Malloy* rule.

The plurality opinion in *Spevack* chose the second alternative, although it indicated that this was not their intention.[110] Justice Fortas' opinion seems to follow the third alternative.[111] The Supreme Court's most recent pronouncements dealing with government employees and public officials supports this position and are a persuasive indication that the Court has departed from its earlier holdings in this area.[112]

Last term in *Gardner v. Broderick*[113] the Court held unconstitutional a New York City charter provision[114] which required policemen to testify and waive immunity from prosecution[115] at grand jury inquiries into alleged misconduct in office. Gardner refused to execute the waiver and, following an administrative hearing, was dismissed on the grounds of employee insubordination.[116] The

108. 385 U.S. at 605.

109. *See* Note, *Constitutional Law*, 16 Am. U.L. Rev. 420, 425 (1967).

110. *See* Spevack v. Klein, 385 U.S. at 516 n.3.

111. *Id.* at 520 (concurring opinion, Fortas, J.).

112. In *Adler v. Board of Education*, 342 U.S. 485 (1952), *Beilan v. Board of Education*, 357 U.S. 399 (1958), *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960), and *Lerner v. Casey*, 357 U.S. 468 (1958), the Court had upheld dismissals for insubordination and the reliance by petitioners upon the privilege against self-incrimination.

113. 392 U.S. 273 (1968).

114. Section 1123 of the New York City charter provides for the dismissal of city employees who: (1) refuse to appear before "any officer, board, or body authorized to conduct any hearing or inquiry" or (2) upon appearance before such body relies upon his privilege against self-incrimination as the reason for not answering any question concerning his official conduct or (3) "on account of any such matter in relation to which he may be asked to testify."

115. Section 6, Article I of the New York Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

116. Since *Slochower v. Board of Education*, 350 U.S. 551 (1956), employee insubordination, or some variant thereof such as incompetency, doubtful trust or reliability has been the basis for dismissal for those who refuse to answer questions relying on the fifth amendment, in order to avoid denial of due process arguments.

Appellate Division dismissed a petition for reinstatement.[117] Appealing to the New York Court of Appeals, Gardner urged that he had been discharged solely for exercising his privilege against self-incrimination. The Court of Appeals indicated that the case was not governed by *Garrity* because it involved merely a sanction of discharge from employment rather than a criminal prosecution. The Court also distinguished *Spevack* on the ground that in that case a lawyer was involved whereas in *Gardner* a public employee was being dismissed.

On appeal to the Supreme Court of the United States the denial of Gardner's petition for reinstatement was reversed. Justice Fortas rejected the distinction made by the New York Court, and reasoned that the privilege against self-incrimination is as available to a policeman as to an attorney. A policeman should not have to be confronted with the choice between self-incrimination and dismissal from his employment. However, Justice Fortas did indicate that the privilege against self-incrimination would not be a bar to the dismissal of a public employee who refused to answer pertinent questions without being required to waive his immunity against prosecution.[118] In other words, a witness could be compelled to answer questions relating to the performance of his public duties if he were protected against the use of his answers in any subsequent criminal prosecution against him.

In his concurring opinion, Justice Harlan read into the reasoning of the majority a "procedural formula whereby . . . public officials may now be discharged for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices."[119] This, he felt, was a significant limitation on what the rationale of *Garrity* and *Spevack* may have been thought to portend.

The significance of this opinion is in the fact that Justice Fortas' opinion did not touch upon the issue of whether lawyers could be disciplined for their assertion of the privilege, and Justice Harlan read into the majority opinion exactly that reasoning.

A companion case, *Sanitation Men. v. Sanitation Commissioner*[120] involved employees of the Department of Sanitation of the City of New York who had refused to testify in administrative proceedings for the investigation of corruption and had been discharged for failure to sign waivers of immunity. The Court held, in an opinion written by Justice Fortas, that the employees

> were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public

117. 27 A.D.2d 800, 279 N.Y.S.2d 150 (1st Dep't. 1967).

118. 392 U.S. at 277-78. *See also,* Justice Fortas' statement that "The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." *Id.* at 276.

119. 392 U.S. at 285 (concurring opinion, Harlan, J.).

120. 392 U.S. 280 (1968).

trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.[121]

This seems to be in conflict with Fortas' statements in *Gardner* that the privilege could be waived, or answers compelled regardless of the privilege if their is immunity from prosecution.[122]

Although there are many problems that have not been solved by these decisions, one thing is certain: the privilege against self-incrimination has been extended and broadened whereby the scope of the privilege encompasses practically all administrative proceedings, including disbarment proceedings. Whether this is constitutional or not can only be discerned by a critical analysis of the development making the privilege applicable in such proceedings.

IV. Scope of the Privilege

The privilege against self-incrimination is one of the most exalted of the constitutional protections.[123] The courts have accorded it a liberal construction,[124] and have indicated that the scope of the privilege is "as broad as the mischief against which it seeks to guard."[125] The constitutional protection of a witness against self-incrimination applies in civil as well as criminal proceedings.[126] Recently, the Supreme Court extended the privilege to adversary proceedings of a quasi-criminal nature.[127]

The constitutional privilege is intended to protect the individual from compulsory testimony against himself. This protection encompasses extorted confessions, as well as compelling testimony in examinations during court proceedings.[128]

The constitutional protection against self-incrimination is purely a personal one,[129] and was never meant to apply to corporations, partnerships, labor unions or other organizations.[130] It was also never intended that a witness would be

121. *Id.* at 284.

122. *See supra* note 118 and accompanying text.

123. *See* Note, *Immunity Statutes and the Constitution*, 68 Colum. L. Rev. 959, 961 (1968).

124. *See* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

125. *See* Miranda v. Arizona, 384 U.S. 436, 459-60 (1966). "Those who framed our Constitution and Bill of Rights were ever aware of subtle encroachments of individual liberty . . . The privilege was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard.'"

126. *See* Arndstein v. McCarthy, 254 U.S. 71 (1920).

127. *See* In Re Gault, 387 U.S. 1 (1967). "It is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil, or administrative proceeding, if the statement is or may be inculpatory." 387 U.S. at 49.

128. *See* 58 Am. Jur., Witnesses Sec. 36-56.

129. *See* Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911); Essgee Co. v. United States, 262 U.S. 151 (1923).

130. *See* United States v. White, 322 U.S. 694 (1944). *See also* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968) where the Court followed the rationale that the privilege is personal. *See*, however, the dissenting opinion of Justice Douglas where he states: "I fail to see how any penalty—direct or collateral—can be imposed on anyone for

allowed to plead the fact that some third party might be incriminated by testimony, even though such witness was an agent of that person.[131]

Generally the witness must explicitly claim his constitutional privilege or he will be considered to have waived it.[132] The courts have taken special care to ensure that the privilege is not violated or undermined. The result is that a mere assertion of the privilege generally brings it into effect. It is, however, essential to the existence of the right to refuse to testify that the danger be real and appreciable, not of an imaginary or unsubstantial character. The rule was enunciated in *Mason v. United States*,[133] where the court held that a witness cannot refrain from answering merely on his personal assertion and that "[t]he constitutional protection against self-incrimination 'is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.' "[134]

The general rule is that it is for the court to decide whether the witness's fear of incrimination is well founded. The classic statement of these rules was made by Chief Justice Marshall in *United States v. Burr*:[135]

> When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. . . .
>
> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then . . . that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.[136]

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invoking a constitutional guarantee. A corporation, to be sure, is not a beneficiary of the Self-Incrimination Clause, in the sense that it may invoke it . . . . Yet placing this family corporation on the blacklist and disqualifying it from doing business with the State of New York is one way of reaching the economic interest of the recalcitrant president. If, as I felt in Spevack v. Klein, . . . placing the penalty of disbarment on a lawyer for invoking the Self-Incrimination Clause is unconstitutional, so is placing a monetary penalty on a businessman for doing the same." 392 U.S. at 290-91.

131. *See* Hale v. Henkel, 201 U.S. 43 (1906).
132. *See* Rogers v. United States, 340 U.S. 367 (1951).
133. 244 U.S. 362 (1917).
134. *Id.* at 365.
135. 25 Fed. Cas. 38 (1807 CC Va.) F. Cas. No. 14692e.
136. Found in Annotation, 95 L. Ed. 1126, 1127-28 (1951).

Since the privilege may be applicable in many different types of proceedings[137] and the problems that may develop out of each hearing are unique, the witness has the burden of establishing that the questions asked of him will lead to evidence that will result in criminal prosecution. However he need not conclusively prove that the answer would have such effect. The Supreme Court in *Hoffman v. United States*,[138] asserted this, reasoning that

> . . . if the witness, upon interposing his claim, were required to prove the hazard in the sense which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[139]

The modern trend seems to permit the witness to claim his privilege upon a slight showing of the possiblity of future prosecution. The witness is not required to conclusively demonstrate that his answer would result in his subsequent conviction of a crime, nor must he disclose the exact nature of the hazard feared.[140]

However, when the witness voluntarily testifies, the rule applicable in criminal cases that an individual's testimony and credibility may be impeached, comes into operation. The breadth of his privilege is determined by the relevant cross-examination which is permissible. Likewise, in situations involving administrative hearings, this rule prevents a defendant from presenting to the jury or hearing board all the facts which tend in his favor without laying himself open to cross-examination upon these facts.

A critical issue in this situation is whether a witness who discloses a fact or transaction, *without* invoking his privilege, thereby waives his privilege with respect to other details and particulars which may incriminate him as to that which he has disclosed. In an early decision, *Brown v. Walker*,[141] the Supreme Court was of the opinion that the witness may waive his privilege and disclose information. However, if he does so, he must make a full disclosure.[142] The rule was more clearly expressed in *Rogers v. United States*,[143] where a witness testified that she had been in possession of certain books and records of the

137. *See* Clapp, *Privilege Against Self-Incrimination*, 10 Rutgers L. Rev. 541 (1956) where the writer lists seven various proceedings to which the privilege may be applicable. They include: (1) The Legislative Investigating Committee; (2) The Third Degree; (3) Preliminary Hearings; (4) Grand Jury Proceedings; (5) Trial-Accused; (6) Trial-Witness Testifying; (7) Trial Criminal or Civil-Witness Testifying.

138. 341 U.S. 479 (1951).

139. *Id.* at 486-87.

140. *See* In Re Hitson, 177 F. Supp. 834, at 840 (N.D. Cal. 1959), rev'd on other grounds 283 F.2d 355 (9th Cir. 1960).

141. 161 U.S. 591 (1896).

142. *Id.* at 597.

143. 340 U.S. 367 (1951).

Communist Party. The witness refused to disclose the name of the person to whom she gave the records, relying upon her fifth amendment protection. The Court held, on the authority of an early Michigan Supreme Court case, that

> Where a witness has voluntarily answered as to materially criminating facts, . . . he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate.[144]

A significant dissent was registered by Justice Black in *Rogers* wherein he attacked the majority opinion for their erroneous reliance on the waiver doctrine.[145] Black also pointed out the dilemma with which the prospective witness is faced in this type of situation stating that

> . . . today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it.[146]

The law with respect to answering revelant inquiries seems to have been settled in *Brown v. United States*.[147] In a denaturalization proceeding against the petitioner, the Government contended that the petitioner had engaged in Communist activities for over ten years and that she did not believe in the principles of the Constitution. The petitioner voluntarily testified in her own behalf but on cross-examination, when asked whether she was then presently a member of the Party she refused to answer, invoking the privilege against self-incrimina-

144. *Id.* at 373-74. The Michigan decision from which the text was taken was *Foster v. People*, 18 Mich. 266 (1869). Wigmore's Treatise on Evidence (1940) Sec. 2276 summarizes the law as follows: "The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by *answering as to fact X, he has waived it for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole. (Emphasis in original.)" 340 U.S. at 374 n.16.

145. 340 U.S. 367, at 376 (dissenting opinion, Black, J.).

146. *Id.* at 378. Black alluded to the practical difficulties inherent in the rule announced by the majority opinion in *Rogers* and cited in *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942) as his authority. There the district court also relied on *Foster v. People*, 18 Mich. 266 (1869), and stated: "The result of using this, like any other privilege, is to deprive people of evidence which would otherwise be available; at best a disastrous necessity, for disputes ought to be settled so far as they can be by resort to the whole truth . . . surely we should not resort to so unnecessary and deplorable an innovation." 132 F.2d at 840. *Compare* Judge Frank's dissenting opinion in the same case where he declares: "It is well settled . . . that a witness may properly refuse to answer a question on the ground that the answer will incriminate him, even though the question on its face is harmless, . . . a witness may, therefore, at the beginning of a series of dangerous questions, perceiving where they may lead, assert the privilege. If, however, he fails to do so early in the course of questioning and, although he might then have objected, answers some questions which may have a tendency to incriminate him, those answers do not deprive him of the privilege of later refusing to answer further questions which more clearly put him in danger of punishment." 132 F.2d at 843-44, dissenting opinion, Frank, J.

147. 356 U.S. 148 (1958).

tion. The Supreme Court of the United States affirmed her contempt conviction. Justice Frankfurter pointed out the difficulty facing a witness when he appears to testify, but commented that a witness who voluntarily testifies in his own behalf, should not be permitted to escape cross-examination by claiming his fifth amendment privilege. To allow this would, on occasion, put before the trier of fact a one-sided account of the disputed facts, without the reliability of the witness having been tested.

The witness's privilege against self-incrimination is amply protected when he testifies voluntarily, even when subject to cross-examination, since it is he who determines the area of disclosure, and therefore the scope of inquiry on cross-examination. The witness has the choice not to testify at all. Justice Frankfurter concluded that the witness "cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute."[148]

Justice Black for a critical minority argued that the rules regarding waiver of the privilege against self-incrimination applicable in criminal proceedings could not be extended to civil proceedings "absent the most compelling justification," and that to do so erodes the constitutional privilege.[149]

Justice Brennan also filed a dissenting opinion in *Brown* indicating that the district court did not have the untrammeled discretion to punish for contempt. He defended the petitioner's action and added that

> her resort to her Fifth Amendment rights manifestly had substantial merit, for the majority does not say that the Amendment's protection against being required to give incriminating answers did not apply to the questions, but only that she waived the protection of the Amendment in the circumstances.[150]

Inherent in all these situations is the proposition that the privilege can be waived. Whether the problem of waiver as decided in *Garrity* may change the strategy of the witnesses and hearing committees during disbarment proceedings cannot yet be accurately determined. The following section on the concept of waiver and immunity statutes will assist in presenting a useful characterization.

V. Immunity Statutes and the Problem of Waiver

Although the privilege against self-incrimination serves as a bulwark against government coercion of a defendant in criminal cases, it oftentimes restricts the effective information gathering power which is necessary to an ordered society. Congress and state legislatures, in order to avoid the inhibitive effect of the privilege have promulgated numerous statutory grants of immunity which allow governmental agencies to question witnesses and require them to

148. *Id.* at 155-56.
149. *Id.* at 158-59 (dissenting opinion, Black, J.).
150. *Id.* at 164 (dissenting opinion, Brennan, J.).

testify in exchange for their immunization from criminal liability for any crime disclosed in their testimony.[151]

The early immunity statutes[152] were enacted to extend immunity to witnesses before congressional committees. In 1868, an immunity statute was passed that extended this right to testimony given in any judicial proceeding in federal courts.[153] The early decisions involving these statutes permitted the introduction of compelled testimony.

In *Counselman v. Hitchcock*,[154] the United States Supreme Court held that the validity of immunity statutes was dependent upon complete prosecutorial dispensation. The case arose under a federal immunity statute which prohibited the use of compelled testimony in any susequent federal criminal proceeding against the witness.[155] The petitioner in *Counselman* was promised immunity but he refused to answer questions relating to violations of the Interstate Commerce Act. The petitioner was held in contempt of court and taken into custody for his refusal to answer pertinent questions. On appeal from the denial of a writ of habeas corpus, the Supreme Court held that since compelled testimony could provide leads to evidence that might be incriminating in a criminal trial there was a violation of the fifth amendment. In order for the immunity statute to pass constitutional muster the Court held that it ". . . must afford absolute immunity against future prosecution for the offense to which the question relates."[156]

In holding that the federal immunity statute did not provide adequate protection as embodied within the fifth amendment the Court declared:

> No statute which leaves the . . . witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States . . . [T]he protection of Sec. 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution.[157]

State laws making the constitutional privilege and immunity statutes[158]

151. For a complete list of the State Immunity Laws *see* 8 Wigmore, Sec. 2281 and for the Federal Immunity Statutes, *see* Comment, 72 Yale L.J. 1568, 1611 (1963). For an excellent discussion of the impact of these statutes see Note, *State Immunity Statutes in Constitutional Prospective*, 1968 Duke L.J. 310 (1968).

152. *See* Note, *Immunity Statutes and the Constitution*, 68 Colum. L. Rev. 959, 960-61 (1968).

153. *Id.* at 960 n.15.

154. 142 U.S. 547 (1892).

155. Rev. Stat. Sec. 860 provided as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding . . . , shall be given in evidence, or in any manner used against him . . . , in any Court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . ."

156. 142 U.S. at 586.

157. *Id.* at 565.

158. Three Supreme Court decisions, *Twining v. New Jersey*, 211 U.S. 78 (1908) (fifth amendment not applicable to the states); *United States v. Murdock*, 284 U.S. 141 (1931) (fifth amendment does not require federal immunity statute to grant immunity from state

coextensive were not disturbed until 1964 when the Supreme Court decided *Malloy v. Hogan*.[159] There the Court held that the due process clause incorporated the fifth amendment's protection against self-incrimination, thereby applying it to the states.[160] This created a nearly absolute scope of protection for the prospective witness.[161]

Most jurisdictions[162] do not provide and do not have the authority to provide immunity to an attorney testifying at disbarment proceedings. Since the privilege has been made applicable to disbarment proceedings by way of *Spevack* and the rationale of waiver is applicable in those situations wherein the attorney voluntarily testifies, it can be readily discerned that *Spevack* will present difficulties in determining the extent of questioning which will be permitted on the part of disbarment committee and which procedures they will adopt.

VI. Disbarment Proceedings—Due Process and the Fifth Amendment

As noted heretofore, it is wholly incident to the power of the judiciary to maintain high standards of professional conduct.[163] Although many varying methods of procedure are used in the various jurisdictions[164] it is universally acknowledged that any attorney should be given fair notice of the charges as well as a full and fair hearing. The importance of procedural due process was succinctly stated by Mr. Justice Jackson when he said:

> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. . . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.[165]

At the outset it is important to classify disbarment proceedings. The proceeding is generally regarded as civil in nature,[166] despite the fact that a few

prosecution); and *Feldman v. United States*, 322 U.S. 487 (1944) (testimony introduced under state immunity statutes allowed in federal court) all preceded the *Malloy* case.

159. 378 U.S. 1 (1964).

160. *Id.* at 3.

161. *See* Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues*, 3 U.S.F.L. Rev. 12, 27 (1968).

162. For a list of all the state disbarment procedures and an outline of the method used, *see* Potts, *Disbarment Procedure*, 24 Texas L. Rev. 161, 179-89 (1945).

163. *See supra* notes 46-60 and accompanying text.

164. *See infra* note 176 and accompanying text.

165. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (dissenting opinion, Jackson, J.).

166. Ex Parte Wall, 107 U.S. 265 (1882); In Re Kohler, 240 App. Div. 501, 270 N.Y.S. 634 (1934); Houtchens v. State, 63 S.W.2d 1011, *reversing* 47 S.W.2d 679 (1932) (Tex. Com. App. 1933); Braverman v. Bar Ass'n, 209 Md. 328, 121 A.2d 473 (1956); In Re Speiser, 294 S.W.2d 656 (Mo., 1956); In Re Foley, 364 S.W.2d 1 (Mo., 1963); In Re

courts have made reference to the punitive character of these proceedings and have classified them as criminal proceedings.[167] The Supreme Court of the United States has recently intimated that such proceedings are of a quasi-criminal nature.[168] This classification is important since it determines and influences the quantum of evidence required to disbar an attorney and affects the investigatory procedures employed by disbarment committees. An early Massachusetts Court made the following observation with respect to disbarment procedures:

> At common law an attorney was always liable to be dealt with in a summary way for ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment or information was ever necessary as the foundation of such proceedings.[169]

Most assuredly our system has come a long way from that harsh standard. However, the rules promulgated by each state legislature or judiciary have now been left impotent by virtue of the rationale in *Spevack*. Facts which are peculiarly within the knowledge of the disciplined attorney may be concealed by his mere reliance on the privilege against self-incrimination. Thus a disbarment committee must develop its case through independent sources, making the task of the agency given such authority that much more difficult.[170] This is no argument for the abolition of the fifth amendment protection as applied to attorneys in disbarment proceedings; merely a warning to those who look beyond the need for an unsullied bar and perhaps overemphasize the rigors of due process.

Courts have generally called the practice of law a "privilege" rather than a "right."[171] The former term has been used to justify the exclusion of those members of the bar whose behavior deviated from the norm. As one New York tribunal declared:

> Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment or admission; but it is equally essential afterwards . . . Whenever the condition is broken, the privilege is lost.[172]

Peterson, 260 Minn. 339, 110 N.W.2d 518 (1961); Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d 93, 231 N.E.2d 718 (1967).

167. In Re Harris, 88 N.J.L. 18, 95 A. 761 (1915); Lantz v. State Bar of California, 212 Cal. 213, 298 P. 497 (1931); In Re Ruffalo, 390 U.S. 544 (1968) speaking of disbarment as a punishment.

168. *See* In Re Ruffalo, 390 U.S. 544 (1968).

169. In Re Randall, 93 Mass. (11 Allen) 473, 479 (1865). Found in Note, *Constitutional Law-Due Process of Law In State Disbarment Proceedings*, 37 Notre Dame Law. 346, 347 n.10 (1962).

170. For a critical look at the supervision of the New York Bar, *see* Schizer, *The Brooklyn Judicial Inquiry: A Record of Accomplishment*, 29 Brooklyn L. Rev. 27, 42 (1962).

171. *See* Note, *Admission to the Bar*, 47 Neb. L. Rev. 128, 141 (1968). This student casenote presents an interesting study of the influence of Justice Black in the area of disbarment and indicates that the Supreme Court may be turning away from the view that the practice of law is a privilege and possibly concluding that it is a "vested" right.

172. Matter of Rouss, 221 N.Y. 81, 84-85, 116 N.E. 782, 783 (1917). *See also* People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

When the state admits a person to practice and grants him a license, it is representing to the public that this individual is worthy of its trust and confidence. Thus it should not be held an invalid exercise of the state's police power to protect the public and the profession from undesirable persons.[173]

The precise issue is whether the lawyer's right to remain silent under the mantle of the fifth amendment over-rides his special responsibility to the public. As one attorney has argued:

> It is fallacious to equate the lawyer facing disbarment with a criminal facing prosecution. A simple but more apt analogy could be drawn between our profession and the cashier who is privileged to handle the store's money. No responsible person would propose that a cashier who appeared to be pocketing cash receipts and who persistently refused on constitutional grounds to answer any questions pertaining to the shortage should continue as a cashier. Common prudence would suggest that the cashier be transferred to another position that did not involve the handling of money. Lawyers have a constitutional right against self-incrimination but lawyers do not have a constitutional right to remain a lawyer.[174]

The essential qualities of honesty, integrity and probity are imposed upon an attorney exercising privileges and responsibilities as a member of the bar. It has been suggested that when lack of these qualities becomes apparent in an attorney's transactions with his clients and the public in general, it becomes the duty of the court to remove from its roster such an undesirable member.[175]

The method used by each state whenever it purges its bar membership is varied. Some follow what has been termed the "agency" type procedure.[176] In

173. *See* Cole, *Bar Discipline and Spevack v. Klein*, 53 A.B.A.J. 819 (1967).

174. *Id.* at 820.

175. In Re Stolen, 193 Wis. 602, 613, 214 N.W. 379, 383 (1927).

176. *See* Ill. Smith-Hurd Ann. Stat. Ch. 110A, sec. 751; Ind. Burn's Stat. 1946 Repl. Sec. 4-3618; Kent. KRS-30.190; Mass. Ann. Laws ch. 221 sec. 40 et seq.; Penn Purdon's Stat. tit. 17 sec. 1661 et seq.; Ohio Page's Ohio Rev. Code Ann. sec. 4705.02; and N.Y. Judiciary Law § 90 *et. seq.* (McKinney 1968). The New York and Ohio laws should be compared. In both jurisdictions, the courts generally designate a fact-finding "agency" to investigate the charges against the attorney. In Ohio the statute reads: "The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all the courts of the state . . . Judges of such state courts are required to cause proceedings to be instituted against an attorney, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal, or reprimand." (Page's Ohio Rev. Code Ann. Sec. 4705.02.) In New York the applicable statute reads: "The Supreme Court shall have power and control over attorneys . . . and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . ." N.Y. Judiciary Law § 90(2) (McKinney 1968). With respect to the investigating agency the statute provides that ". . . it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court . . . to prosecute all proceedings for the removal or suspension of attorneys and

these jurisdictions the court appoints a referee, commissioner, or other judicial body to conduct the actual disbarment investigation. Other jurisdictions have special grievance committees in the respective congressional or county districts which handle these proceedings.[177] Still others permit only the court itself to hear and decide the proper sanction.[178] A small minority of states do not follow the agency type of hearing, but rather as in civil actions, provide for a jury to decide the attorney's fate.[179] In the ordinary disciplinary proceeding, after the facts have been presented to the hearing committe and a prima facie case has been made, the burden then shifts to the attorney. Attorneys generally answer the questions posed by the committee, but many refuse to testify, asserting their rights under the fifth amendment. Although it can be persuasively argued, as in *Spevack,* that the refusal to answer questions as to professional misconduct does not warrant disbarment, the recognition that ethical standards for the profession must be maintained vitiates such an argument. As one bar association committee member concluded:

> Ordinarily the occasion for disbarment should be the demonstration, by a continued course of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed.[180]

Generally, in disbarment proceedings, the ordinary rules of evidence apply.[181] If this is the established rule, it would seem that a permissible inference may be raised for the failure of an attorney to answer the charges brought aginst him. Dean Erwin Griswold has stated it most clearly:

> A lawyer is hailed before [a grievance committee] on a complaint of a client that the lawyer has embezzled the poor widow's funds, and the lawyer says to the Grievance Committee, 'I refuse to answer any questions on the grounds of self-incrimination.' My guess is that the

counsellors-at-law or the said justices or a majority of them may appoint any attorney or counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceeding . . . ." N.Y. Judiciary Law § 90(7) (McKinney 1968).

177. In Connecticut a grievance committee is appointed. Three members from each county who act as an independent public body charged with performance of a public duty. The statute reads in part: ". . . whose duty it shall be to inquire into, investigate and present to the court offenses not occurring in the actual presence of the court involving the character, integrity, professional standing and conduct of members of the bar." (Gen. Stat. of Conn. Rev. 1958, Sec. 51-90).

178. This is the case in Missouri. *See* Vernon's Ann. Miss. Stat. Sec. 484.240-270 (1949).

179. Arkansas and Texas are two states which provide a trial by jury in disbarment cases. *See* Ark. Stat. Ann. Sec. 25-411 (1947) and Tex. Rev. Civ. Stat. art. 316 (1959).

180. Drinker, Legal Ethics, 46-47 (1953).

181. *See* People *ex rel.* Chicago Bar Ass'n v. Amos, 246 Ill. 229, 92 N.E. 857 (1910). *See also supra* note 169 at 355.

> Grievance Committee reports that he ought to be disbarred, and if I were on the Grievance Committee, I think I would, assuming that there is evidence as I have said connecting him with it, and he does not make any appropriate response.[182]

The policy consideration underlying the *Spevack* decision is a tenuous balance between the individual attorney's personal rights and the duties he owes to the public. With that in mind, one must consider the impact of that rationale.

VII. Impact of the Rationale of Spevack v. Klein

Undoubtedly, the *Spevack* holding casts doubt on the constitutional validity of state statutes which require the accused attorney in disbarment proceedings to bear the burden of proving fitness. There are those who may logically conclude that the words "incrimination" and "criminal case" have been expanded by *Spevack* so that a witness may now declare: "I refuse to answer on the ground that my answer might subject me to professsional discipline."[183]

The practical effect of *Spevack* is best illustrated by these two extreme circumstances. In situations where there is sufficient evidence of misconduct, the attorney when questioned need only cite his privilege to avoid discipline. On the other hand in cases where there is very little evidence, the attorney on being questioned is the only source from whom information can be obtained on which to base any disciplinary action. This latter situation seldom occurs and this is the precise issue which portends trouble for state bar agencies.[184]

Spevack left unanswered the question as to whether disbarment proceedings were civil or criminal in nature.[185] This was recently discussed in *In Re Ruffalo*.[186] The latter case involved an Ohio trial lawyer who had been disbarred for his mishandling of Federal Employer's Liability Act cases. He was subsequently removed from the rolls of the Sixth Circuit Court of Appeals. The Supreme Court of the United States reversed the Court of Appeals, holding that Ruffalo had not been accorded procedural due process.[187] The importance

182. Griswold, *The Fifth Amendment Today*, 39 Marq. L. Rev. 191, 202 (1956). *See also* Schafer, The Suspect and Society, 80 (1967) and Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472 (1959).

183. *See* Niles & Kaye, *Spevack v. Klein: Milestone or Millstone in Bar Discipline?* 53 A.B.A.J. 1121, 1124 (1967).

184. *See* Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970, 971 (1968).

185. The dissent in *Spevack* addressed itself to the issue of whether disbarment was a penal or remedial sanction and concluded that it was the latter. Penal sanctions are those generally imposed in order to punish an individual for past conduct, whereas remedial sanctions are those imposed in order to protect a continuing substantial public interest. For a discussion of the distinction that should be drawn between these two types of sanctions *see* Comment, 72 Yale L.J. 1568, 1586 (1963). The author of that note urges that the scope of penal sanctions be broadened to include all sanctions which deprive the individual of a right at the cost of asserting a constitutional privilege.

186. 390 U.S. 544 (1968).

187. The majority held that the lack of notice to Ruffalo, prior to the time he and another witness, one Orlando were to testify as to his misconduct denied him procedural due process. Justice Harlan, in a concurring opinion, relying on *Theard v. United States*, 354

of the decision, however, is the dicta prevalent in Justice Douglas' opinion with respect to the nature of disbarment proceedings wherein he stated that "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."[188]

Douglas added that disbarment proceedings "are adversary proceedings of a quasi-criminal nature."[189] Although *Ruffalo* does not seem important in terms of an impact upon basic constitutional law, it again reveals the method by which the Court lays the foundation for future principals that ultimately become the law. If a majority of the Court should "equate" disbarment proceedings with a criminal case then attorneys will have the right to refuse to answer any questions that might subject them to discipline or criminal prosecution.[190]

The decision in *Ruffalo* and the rationale of *Spevack* pose the following problems for state bar agencies: (1) Are members of disbarment committees required to apprise the accused attorney of his privilege against self-incrimination following the rules enunciated in *Miranda v. Arizona*?[191] (2) If the attorney appears voluntarily, after being apprised of his privilege, has he effectively waived that right to remain silent? (3) If there is such a waiver and the questioning initially is of a nature that is not incriminating but subsequently begins to be of such a nature, are the "fruits" of such testimony admissible in either criminal or disbarment proceedings? (4) What will be the effect of immunity statutes when applied to attorneys? (5) Is the required-records doctrine exposited in *Shapiro v. United States*[192] a better accomodation between the extreme positions taken in *Spevack*?

U.S. 278 (1956) indicated that the federal disbarment order was adequate to afford Ruffalo due process in the state disbarment proceedings. The majority, however, had held that state disbarment actions are entitled to respect by the federal courts, but are not conclusively binding upon them.

188. 390 U.S. 544, 550 (1968).

189. *Id.* at 551.

190. This is the conclusion drawn by Franck in his article, *supra* note 184, and he cites the *Ruffalo* case as a possible expansion into the area of "criminal cases" with respect to disbarment procedures.

191. The rationale of *Miranda* is that in the absence of a suspect's intelligent waiver of his pertinent constitutional rights, a suspect prior to any in-custody *police* questioning must be warned in clear and unequivocal terms (1) that he has a right to remain silent, (2) that any statement he does make may be used in evidence against him, (3) that he has the right to consult with, and have present prior to and during interrogation, an attorney, either retained or appointed, and (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires. (*See* Annotation—*Necessity of Informing Suspect of Rights Under Privilege Against Self-Incrimination, Prior to Police Interrogation* —10 A.L.R.3d 1054, 1060 (1966)). As a practical matter it would seem that these rules could not be made applicable to disbarment proceedings because such proceedings do not fall within the "in-custody" rationale of *Miranda*. In another context it would not seem feasible that such warnings could be given to an attorney since he would undoubtedly be aware of them and more than likely represent himself rather than consulting with another attorney. In any case, the Supreme Court in making the privilege applicable and holding that disbarment proceedings are of a "quasi-criminal nature" has not exposited any guidelines that should be followed, hence the reliance upon *Miranda* would seem to be justified.

192. 335 U.S. 1 (1948). The *Shapiro* case dealt with the immunity provisions of the Emergency Price Control Act. The OPA regulations requiring merchants to keep records did not excuse them from complying with the Act by a specific claim of the fifth amendment

These legal questions are intriguing and remain unanswered. Regardless of how far the privilege has been extended via *Spevack*, the first round of litigation following *Spevack* indicates that these and many more issues may be raised.

One of the first cases to come before the Supreme Court dealt with the question as to whether *Spevack* was to be given retroactive application. *In Re Kaufman*[193] involved an attorney who had been disbarred one year prior to *Spevack* for issuing worthless checks and converting to his own use over $5,000 of his client's share of a personal injury claim. The Supreme Court

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privilege. The immunity provisions of the Compulsory Testimony Act of 1893 compelled merchants to produce books, papers, tariffs, contracts, agreements and the like if they were subpoenaed before the Interstate Commerce Commission. The Court reasoned that these records were "public" as distinguished from private papers and held that the required-records provision did not violate the fifth amendment. Although the logic of this doctrine would seem to violate cardinal constitutional safeguards under the fourth and fifth amendments, most federal administrative agencies have not exceeded the limits of the *Shapiro* rationale. Chief Justice Vinson, writing for the majority in *Shapiro* did conclude "that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." The factual circumstances did not disturb Vinson because "there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government . . . can constitutionally require the keeping of particular records, subject to inspection by the Administration." 335 U.S. at 32. The danger of the majority opinion in *Shapiro* was noted by Justice Jackson: "The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him . . . . It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule not merely to records specially required under the Act but also to records 'customarily kept,' invites and facilitates that eventuality." (335 U.S. at 70-71, dissenting opinion, Jackson, J.) The inconsistency of the *Shapiro* doctrine was excellently described by Professor McKay when he said: "The doctrine is accordingly inconsistent with both major policy purposes of the privilege previously outlined: preservation of morality in government and preservation of individual privacy. A government that can roam at will through all records that it may demand to inspect because it may demand that they be kept is not a government that is bound to respect individual privacy. That *Shapiro* has not led, as it could have, to substantially more is a tribute to the self-restraint of government officials than to any meaningful limits in *Shapiro*." (Found in Kurland, The Supreme Court Review 1967, 193 at 217.) Although the Supreme Court in three federal registration cases (*Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968)) seemed to have discussed the required-records doctrine it side-stepped the issue in the exercise of judicial restraint. The Court approached these cases just as it did in *Spevack*. If the assertion of the privilege was "costly" it was unconstitutional. Although the *Shapiro* doctrine was discussed by the other Justices in *Spevack* they failed to test its applicability to disciplinary proceedings and the possible ramifications of such an application. Most attorneys keep records that are subpoenaed in disbarment proceedings. The hearing committee does not do this in order to skirt its burden of proof; merely that more often than not they are the only records which are available. It would seem preferable to expand the required-records doctrine in the area of disbarment rather than limit it. Since attorneys handle an individual's private affairs and their money, what better way to prevent fraud or conversion than the necessity to keep records. This is the procedure that exists in England. (*See* Solicitors' Accounts Rules, 1945, 2 Annual Practice (1961) 3006, and Solicitors' Trust Account Rules, 1956, *id.* at 3014.)

193. 25 A.D.2d 68, 266 N.Y.S.2d 158 (1967).

denied certiorari and it thus appears that *Spevack* will be given only prospective application.[194]

Two cases, arising in New York, *Zuckerman v. Greason*,[195] and *Kaye v. Co-Ordinating Committee On Discipline*,[196] came before the Court one month after *Spevack*. In *Zuckerman*, the petitioner and another attorney had submitted misleading, exaggerated, and false medical bills and statements and had refused to cooperate with the court in an effort to expose such unethical practices and to determine whether the attorneys were guilty of professional misconduct. The attorneys refused to produce certain documents, claiming their privilege against self-incrimination. On remand from the Supreme Court of the United States the New York Appellate Division entered an order suspending Zuckerman for five years.[197] The Court of Appeals affirmed, and declared that an attorney could be disbarred or suspended for invoking the faith amendment in a disciplinary proceeding, since the constitutional privilege did not justify withholding evidence which could not lead to criminal prosecution but which bore only upon an attorney's right to continue the practice of law.[198] Judge Van Voorhis stated:

> These men have made the disclosures which have contributed to the disciplinary measures which have been imposed upon them. They are not charged with crime . . . We do not suggest that the witness is protected by the Constitution only when testifying in criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime . . . The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence that they would be disbarred under *Cohen v. Hurley*, but neither *Garrity* nor *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.[199]

The attorney's petition to the Supreme Court for certiorari was denied.[200] This interpretation of the *Spevack* case seems to reject the idea that disbarment is a "penalty" and stresses the fact that only if the "fruits" of the testi-

194. 389 U.S. 1048 (1967).

195. 23 A.D.2d 825, 259 N.Y.S.2d 963, *reversed and remanded* 386 U.S. 15 (1967).

196. 24 A.D.2d 345, 266 N.Y.S.2d 69, *reversed and remanded* 386 U.S. 17 (1967).

197. 28 A.D.2d 907 (2d Dept. 1967.) In the first decision, Haber and another attorney had been suspended for five years and Zuckerman disbarred. On remand both attorneys received five year suspensions.

198. 20 N.Y.2d 430, 285 N.Y.S.2d 1, 231 N.E.2d 718 (1967).

199. *Id.* at 433, 231 N.E.2d 721.

200. 390 U.S. 925 (1968).

mony are to be used in a subsequent criminal prosecution is such a disbarment unconstitutional.[201]

In the *Kaye* case, involving disciplinary proceedings of an attorney who had "farmed out" negligence cases without regard to the services and responsibilities he owed to his clients, the Appellate Division examined Kaye's past disciplinary record and concluded that disbarment was fully justified.[202] The Supreme Court, as in *Zuckerman,* denied certiorari in the *Kaye* case.[203]

A number of cases also presented the issue as to whether an immunity statute would preclude disbarment. The first case, *In Re Ungar,*[204] developed out of a contempt conviction sustained by Ungar, arising as a result of his conduct at a criminal trial involving governmental officials who had violated a conflict of interest statute.[205] He was disbarred for aiding and abetting those officials in violation of the statute and the attempted obstruction of justice. He appealed to the United States Supreme Court, one week prior to *Spevack* and review was denied.[206] After *Spevack* was decided Ungar then filed a motion with the Appellate Division to vacate the order on the grounds that the testimony given before the grand jury investigating the alleged corruption had been compelled by a grant of immunity. Ungar argued that the criminal charges could not be the basis for disbarment. The court denied his motion on the grounds that the fifth amendment proscribes compelled testimony only in a criminal case, and a disciplinary proceeding is not of a criminal nature.[207] On appeal to the United States Supreme Court, certiorari was denied.[208]

Another New York case, *In Re Klebanoff,*[209] dealt with an attorney who employed another lawyer who had been previously disbarred and who had also been guilty of professional misconduct in his failure to comply with the court rules and his submission of false bills of particulars. He was disbarred as a result of information given by him before a grand jury investigating the alleged misconduct. He appealed to the New York Court of Appeals arguing that he had not received immunity as a result of his coming before the grand jury and testifying, and that it was a violation of due process for the disbarment committee to use the compelled testimony against him in a subsequent disbar-

201. This is the point that Justice Fortas seems to be making in Gardner v. Broderick, 392 U.S. 273 (1968).

202. 29 A.D.2d 20, 284 N.Y.S.2d 921 (1st Dept., 1967). The court checked Kaye's past disciplinary record which included the defrauding of insurance companies, 222 App. Div. 829, 226 N.Y.S. 391 (2nd Dept., 1928), and issuing bad checks for which he was suspended, 281 App. Div. 508, 120 N.Y.S.2d 822 (1st Dept., 1953). Seven years after the first disbarment he received a presidential pardon, 243 App. Div. 615, 277 N.Y.S. 636 (2nd Dept., 1935) and a reinstatement after the 1953 suspension, and concluded that his disbarment should not be reduced to a suspension.

203. — U.S. —.

204. 25 A.D.2d 322, 269 N.Y.S.2d 163 (1st Dept., 1966).

205. *See* Franck, *supra* note 184, at 971-72.

206. 385 U.S. 1006 (1967).

207. 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept. 1967), *affd* 18 N.Y.S.2d 690.

208. 389 U.S. 1007 (1967).

209. 21 N.Y.2d 920, 289 N.Y.S.2d 755, 237 N.E.2d 75, (1968).

ment proceeding. The New York Court rejected his theory on the authority *Zuckerman*, and the Supreme Court as it had done in the other cases arising in New York, denied certiorari.[210]

One of the cases most clearly demonstrating the problems created as a result of *Spevack* is *Curry v. Florida Bar*.[211] An attorney in Florida was suspended for six months for solicitation of business. The attorney appeared before the grievance committee as required by the Florida Bar's Integration Rules and testified without invoking his privilege. The attorney argued that immunity had been conferred upon him by virtue of his appearance before the committee. The Florida Supreme Court rejected his contention, held:

> In this proceeding we have no statutory immunity where he is called to testify. . . . At no time during this proceeding did Mr. Curry refuse to testify or otherwise claim his constitutional right against self-incrimination.[212]

Review is pending before the Supreme Court and it remains to be seen whether *Spevack* and *Ruffalo* will be further extended.[213] The Court has denied review on five[214] disbarment and disciplinary cases and two other cases involving collateral issues are still awaiting disposition.[215]

From the recent trend it would seem that the Court is not inclined to depart from the *Spevack* rationale. Whether the court changes its position will depend on the number of factors, many of them so complex that recital would be of no avail. An interesting possibility is a change in the composition of the Court if and when Chief Justice Earl Warren carries out his intended and publicly announced retirement.[216] Just as in *Spevack*, where the composition

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210. — U.S. — (1969).

211. 211 So. 2d 169 (Fla. Sup. Ct. 1968).

212. *Id.* at 172.

213. *Cert. denied* — U.S. — (1969). There are two questions presented to the Supreme Court in *Curry*. One of them deals with the first amendment privilege and the state's use in disciplinary proceedings leading to disbarment or suspension of evidence via the threat of contempt of court. The other is most intriguing and involves the reapportionment of the Board of Governors of the Florida Bar. *See* In Re the Florida Bar, 175 So. 2d 530 (Fla. 1965). The actual question presented is: "Was attorney denied equal protection of laws by his suspension upon recommendation of Florida Bar Association Board of Governors, whose membership is geographically determined, but that grossly violates 'one-man-one-vote' rule?"

214. Epling v. Ohio State Bar Ass'n, 15 Ohio St. 2d 23, 238 N.E.2d 558 (1968), *cert. denied* (issuing bad checks—record did not support prejudice on part of grievance committee); Hart v. Ohio State Bar Ass'n, 15 Ohio St. 2d 97, 238 N.E.2d 560 (1968), *cert. denied*, no. 419, 37 L.W. 3174 (1968) (failure to file income tax return warranted suspension); Jacobs v. Toledo Bar Ass'n, 13 Ohio St. 2d 147, 235 N.E.2d 230 (1968), *cert. denied*, no. 327, 37 L.W. 3134 (1968) (co-mingling of funds); Winn v. Florida Bar, 208 So. 2d 809 (Fla. Sup. Ct. 1968), *cert. denied*, no. 338, 37 L.W. 3151 (1968) (charging illegal and extortionate fees); and Sglarto v. Klein, 27 A.D.2d 738, 277 N.Y.S.2d 318, 22 N.Y.2d 813 (2d Dept., 1967), *cert. denied* no. 510, 37 L.W. 3165 (1968) (professional misconduct).

215. Preston v. Wisconsin, 38 Wis. 2d 582, 157 N.W.2d 615 (1968), *cert. denied* — U.S. — 89 S. Ct. 452 (1969) (equal protection and due process violated by referee's finding of unprofessional conduct resulting in disbarment based on "preponderance" rather than "clear" weight of evidence). *Also* In Re Shavin, 239 N.E.2d 790 (Ill. Sup. Ct. 1968) (filing of fraudulent income tax return sufficient to warrant disciplinary action).

216. *See* New York Times, June 23, 1968, Sec. 4, p. E3.

of the Court needed only one individual to reverse the trend of the law, perhaps this will be the case after the retirement of the Chief Justice.[217]

A number of problems still remain to be answered. The most important of these is whether the distinction between public employees and attorneys posed by Mr. Justice Fortas will be broadened,[218] whereby the state will be permitted to ask questions of attorneys over their invocation of the fifth amendment.

Another question which most certainly will have to be examined is whether a bar applicant will be permitted to claim his privilege and refuse to answer questions put to him when Character and Fitness Committees conduct their preliminary examinations.[219] Since the Court intimated that there was no difference between disbarment and admission cases in *Spevack*[220] this very well may present the court with a vehicle to enunciate standards that will balance the competing values in this area.

VIII. Conclusion

This study was designed to show that there are no conclusive answers regarding disbarment proceedings and the privilege against self-incrimination. It was presented in a historical context to show how the privilege has developed almost to the point where it is absolute in scope and application. The public outcry has not yet reached the level where the Court will reverse itself com-

217.

(Cohen)		(Spevack)	
Majority	Minority	Majority	Minority
Harlan	Black	Black	Harlan
Clark	Brennan	Brennan	Clark
Frankfurter	Douglas	Douglas	Stewart
Stewart	Warren	Warren	White
Whittaker		Fortas (concurring)	

From the *Spevack* Court the only Justice who is not now presently upon the Bench is Justice Clark who was replaced by Justice Thurgood Marshall. Although he has voted with the liberal majority on most occasions, his concurring opinion in *Ruffalo* would seem to indicate that he might be persuaded to vote with the minority if the factual circumstances of a particular case coincide with his views in *Ruffalo*. Although this is mere speculation the appointment of Warren Burger to replace Earl Warren and the seat left open by the resignation of Abe Fortas presents a possibility of a return to the *Cohen* rationale.

218. *See supra* note 13 and accompanying text.

219. The practical problems that such a rule would create are voluminous at best. An applicant could presumably enter the profession even though he had been convicted of a crime. Although "penal" sanctions once they have been served should not reflect upon the "present" character of a witness, it would be in the best interests of a state to have some knowledge of the applicant's background before certifying him. Since most applicants must show proof of good moral character it is assumed that documentary evidence such as police records and the like should be made available to the investigating committee. If the applicant rested his refusal in not submitting the required documents or material upon fifth amendment grounds, it would seem reasonable to place the burden upon him to show why they should be excluded.

220. "Identical principles have been applied by this Court to applicants for admission to the bar who have refused to produce information pertinent to their professional and moral qualifications." 385 U.S. at 528.

pletely. However, rumblings have been heard in certain parts of our system, most specifically the legislature.[221] If the legislatures begin passing laws which will affect the judicial authority in the area of admissions or disbarments, one can only speculate as to what crises or problems may develop. Most assuredly the state cannot be left powerless in protecting its citizens. Therefore it should be recognized that attorneys must conform to at least minimum standards of ethical conduct. As Judge Cardozo once declared: "We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been intrenched by the very confession of his guilt beyond the power of removal [from the Bar]."[222]

Thus it is incumbent upon the judiciary with the assistance of the respective state bar associations, and under the leadership of the American Bar Association to draft model rules which when adopted will cast a respectful mantle of light upon the entire profession. Attorneys should neither be given preferential treatment nor should they be recognized as "second class" citizens. The problem is a sensitive one, involving morality and a balance of governmental power. Unless the organized bench and bar is able to meet the challenge and clean up its "own house" the state of the profession will remain in ill repute. Again in the words of Cardozo, "[i]f the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."[223]

The work is burdensome but meaningful if a proper formulation can be found to ensure that lawyers adhere to their professional responsibilities. Even though a highly ethical profession can only come as a result of individual morality, its effectiveness can be advanced by a total commitment by the bar. The challenge, a matter of social importance, is there to be met and must be met if the legal profession is to enhance its image.

221. *See* Detroit News, December 8, 1968, p. 3, where one state legislator intimated that he would present a bill to the Michigan legislature to abolish the integrated bar system unless progress could be made in the area of disciplining attorneys who were guilty of unprofessional conduct. His theory would reject the system of examinations and set up a licensing board as exists for dentists, and other professions.

222. Matter of Rouss, 221 N.Y. 81, 85, 116 N.E. 782 (1917).

223. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 480, 162 N.E. 487 (1928).